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No. 71-6673

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MICHAEL RODAK, JR., CLE

In the Supreme Court of the United States

OCTOBER TERM, 1971

JERRY L. GOLDEN,

Petitioner,

v.

C. MURRAY HENDERSON,

Respondent.

BRIEF for RSP

PETITION IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT COUNSEL FOR RESPONDENT

PETITION NOT PRINTED

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ARGUMENT

On January 13, 1965, a Bill of Information was filed charging the Petitioner with armed robbery under Louisiana Revised Statute Title 14, Section 64. On February 15, 1965 the Petitioner, through court-appointed counsel, withdrew his former plea of not guilty and entered a plea of guilty as charged. Subsequently, on February 19, 1965, the Petitioner was sentenced to a term of fifteen years in the Louisiana State Penitentiary, which sentence the petitioner is currently serving.

On June 8, 1970, the Petitioner's application to the

state trial court for a Writ of Habeas Corpus was denied. Thereafter, the Petitioner applied to the Louisiana Supreme Court for Writs of Certiorari and Habeas Corpus. This application was denied on July 15, 1970. Petitioner subsequently filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of Louisiana and on June 28, 1971, after a hearing held before the Honorable Herbert W. Christenberry, the District Court denied the Petition. On February 24, 1972, the United States Court of Appeals for the Fifth Circuit entered a Judgment affirming the District Court's dismissal of the Petition.

Petitioner has filed a Petition for a Writ of Certiorari in this Honorable Court seeking to have this Honorable Court decide the following questions:

1. Whether this Court's holding in *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d. 274 (1969) should be applied retroactively;

2. Whether the Petitioner's guilty plea was intelligent and voluntary; and

3. Whether this matter should be remanded to the District Court for determination of whether Petitioner's plea of guilty was intelligent and voluntary.

The Respondent respectfully submits that this Honorable Court should answer the above questions in the negative and that the Petition for Certiorari should not be granted.

The Petitioner, in support of the Petition for Writs of Certiorari, first asserts that the rule announced by this Court in the case of *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969) should be given retroactive application. The Respondent, however respectfully submits that a retroactive application of *Boykin* is neither justifiable nor feasible.

In *Boykin* this Court held that it was error for a state trial judge to accept a guilty plea without an affirmative showing on the record that such a plea is intelligent and voluntary. The decision reiterated the rule set forth in *McCarthy v. United States*, 394 U.S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d. 418 (1969), concerning the procedure for accepting a guilty plea as prescribed by Rule 11 of the Federal Rules of Criminal Procedure, and, in effect, made the procedures contained in Rule 11 of the Federal Rules of Criminal Procedure applicable to state court proceedings through the 14th Amendment of the Constitution.

The question whether *Boykin* should be applied retroactively has never been answered directly by this Court. However, in the case of *Halliday v. United States*, 394 U.S. 831, 89 S. Ct. 1498, 23 L. Ed. 2d 16 (1969) this Court refused to give retroactive application to the rule of McCarthy, supra. In so doing, this Court held that "in view of the large number of constitutionally valid convictions that may have been obtained without full compliance with Rule 11, we decline to apply *McCarthy* retroactively." Id., at 833, 89 S. Ct., at 1499. From this it is obvious that this Court

was cognizant of the disruptive effect that retroactive application of the *McCarthy* rule would have upon the administration of criminal justice in the Federal system.

Additionally, the fact that this Court has refused to give retroactive effect to *McCarthy*—a decision adopted to serve essentially the same purposes which the rule in *Boykin* was intended to serve—has prompted several Federal Circuit Courts to refuse to give retroactive application to *Boykin*. *United States ex rel Rogers v. Adams*, 435 F. 2d. 1372 (2nd Cir. 1970); *United States ex rel Hughes v. Rundle*, 419 F. 2d. 116 (3rd Cir. 1970); *Smith v. Cox*, 435 F. 2d. 453 (4th Cir. 1970); *Dominguez v. Henderson*, 447 F. 2d. 207 (5th Cir. 1971); *Meller v. Missouri*, 431 F. 2d. 120 (8th Cir. 1970); *Moss v. Craven*, 427 F. 2d. 139 (9th Cir. 1970); *Perry v. Crouse*, 429 F. 2d. 1083 (10th Cir. 1970).

For these reasons then, it is respectfully submitted that this Honorable Court should refuse to give retroactive application to the rule set forth in *Boykin v. Alabama*, supra. As was pointed out by this Court in *Halliday* and is shown by the instant petition, "a defendant whose plea has been accepted without full compliance with Rule 11 may still resort to appropriate post-conviction remedies to attack his plea's voluntariness." 89 S. Ct., at 1499.

As a further basis for the granting of Certiorari, the Petitioner asserts that the lower Court erred in finding that his guilty plea was intelligent because he

had not been advised of any constitutional right except the right to trial by jury. It is respectfully submitted, however, that even if the Petitioner was not "formally" advised of the three basic constitutional rights which are waived by a guilty plea, i.e., the right to jury trial and the right to confront his accusers, the record affirmatively shows that the Petitioner was advised, by competent counsel, he was aware of the nature of the charge against him, and there was nothing to indicate that he was incompetent or otherwise not in control of his mental faculties. *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463 (1970). Accordingly, the Petitioner knew exactly what he was doing when he pleaded guilty to the armed robbery.

Finally, the Petitioner alleges that the District Court failed to make a determination as to whether the Petitioner's guilty plea was voluntary and intelligent and made with a sufficent understanding of the surrounding circumstances. A reading of the Court's opinion, however, reveals that the testimony of the Petitioner's court-appointed attorney at the hearing showed that the Petitioner was advised of the possible courses of action available to him (i.e., to plead guilty or to plead not guilty and go to trial) and that the Petitioner was advised and made aware of the fact that there were five witnesses against him if he decided to go to trial.

Appendix "A" p. 2. The Respondent, therefore, respectfully submits that these facts constitute a sufficient showing that the guilty plea was voluntary and

intelligent and made with a sufficient understanding of the surrounding circumstances.

CONCLUSION

The District Court has found that the Petitioner's guilty plea was made voluntarily and intelligently. The Circuit Court has concurred in that judgment. Although the procedures for accepting a guilty plea established by the *Boykin* decision were not strictly followed, these procedures would not apply to this case unless this Honorable Court decides that *Boykin* should be applied retroactively. Since this Court held in the *Halliday* case that retroactive application of *McCarthy v. United States*—a decision which espoused the same principles contained in *Boykin*—was not necessary in Federal Court proceedings, this Court should similarly hold that retroactive application of the *Boykin* decision is not necessary in state court proceedings.

For these reasons, then the Respondent respectfully submits that the Petition for a Writ of Certiorari in this case should be denied.

Respectfully submitted,

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Assistant Attorney General

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